IN

A NUTSHELL

BY

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PREFACE.

It is impossible to epitomise in a book of this size even the amount of knowledge of Conflict of Laws required for University, Bar and Law Society examinations without sacrificing to conciseness explanatory matter which is indispensable to an adequate comprehension of a new subject. It is therefore emphasised that this book is intended as a supplement to, and not a substitute for, the reading of Burgin & Fletcher's *Student's Dicey* or Cheshire's *Private International Law*.

As a result of the immature development of this branch of the law there exists, on some points, a wide divergence between the rules formulated by Dicey and the views of Dr. Cheshire. An attempt has been made to draw the reader's attention to these differences of opinion, and it is hoped that this will be of particular assistance to students who have not read both books.

Grateful acknowledgments are due to my friend and colleague, Mr. Moss Spiro, Solicitor (Hons.), for a most thorough examination of the proofs and innumerable suggestions and amendments.

G. D. S.

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CHAPTER I.

THE NATURE OF PRIVATE INTERNATIONAL LAW.

Private International Law (or Conflict of Laws) consists of the rules formulated to assist the English Courts in the determination of suits containing some foreign element.

The necessity of reference to foreign systems.

The primary function of law is the protection of vested rights. To avoid injustice reference is made to the laws of foreign countries in order to determine and enforce rights acquired in such countries.

Rules of Private International Law form a part of the substantive law of each country, and accordingly are different under each system. In some topics (*e.g.*, Carriage by Air, Guardianship, Civil Procedure) unification of their internal laws has been achieved among countries which became parties to International Conventions. Where such unification exists, the possibility of a conflict between the laws of such countries is minimised.

CHAPTER II.

JURISDICTION.

PARTIES.

The general rule is that the English Court will entertain an action at the suit of **any person** (wherever domiciled or resident) against any defendant against whom a judgment could effectively be enforced.

The Court is always deemed to have jurisdiction if the defendant was in England at the time of the service of the writ (transient presence is sufficient).

THE PRINCIPLE OF SUBMISSION.

A defendant out of England may voluntarily submit to the jurisdiction, but the Court will not make a decree unless the judgment can be made effective. The Court will therefore inquire whether its decree would be enforced in the defendant's country of residence.

Tallack v. *Tallack* (1927).
Goff v. *Goff* (1934).

The Court has jurisdiction *in rem* over property (whether movable or immovable) situate in England: but no right is thereby conferred to exercise jurisdiction *in personam* over the owner if he is abroad unless he voluntarily submits to the jurisdiction.

EXCEPTIONS TO THE GENERAL RULE.

1. **Disabilities of Alien Enemies.**—They cannot sue: rights of action are suspended during the continuance of the war. But they may plead set-off, defend actions, counterclaim and appeal.

2. **Immunities of Sovereigns and ambassadors.**—They cannot be sued without waiver of privilege (Diplomatic Privileges Act, 1708). This immunity extends to their property as well as to their persons.

The Parlement Belge (1880).

A statement of the Foreign Secretary that the defendant is recognised as an ambassador or member of an ambassador's staff must be accepted as conclusive by the Court.

Engelke v. *Musmann* (1928).

Diplomatic immunity continues after recall—a reasonable time being allowed to an ambassador for winding up official and private business.

8. **The "assumed jurisdiction" of Order XI, r. 1.**—The Court has discretion to allow service of a writ upon a defendant out of the jurisdiction in the ten following cases:—

(a) Where the whole subject-matter is land within the jurisdiction.

(b) Where the action is for the construction, enforcement, etc., of deeds, wills or contracts affecting land within the jurisdiction.

(c) Where the defendant is domiciled or ordinarily resident within the jurisdiction.

(d) Where the action is for the administration of the personal estate of any deceased person who was domiciled within the jurisdiction at the time of his death: or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument which should be executed according to English law.

(e) Where the action is founded on a contract
  (i) made within the jurisdiction, *or*
  (ii) made by an English agent for a principal resident abroad, *or*
  (iii) by its terms or by implication governed by English law
    (Except where the defendant is domiciled or ordinarily resident in Scotland), *or*
  (iv) in respect of a breach committed in England, wherever the contract was made.
    (Except where the defendant is domiciled or ordinarily resident in Scotland or Ireland.)

(ee) On a tort committed within the jurisdiction—
But the tort must have some substantial connection with England.

Kroch v. *Rossell et Cie* (1937).

(f) Where any injunction is sought to cause anything to be done, or to remove any nuisance, within the jurisdiction whether damages are or are not sought also.

(g) Where a person out of the jurisdiction is a necessary or proper party to an action brought against someone duly served within the jurisdiction.

(h) Where the action is in respect of mortgages of personalty within the jurisdiction (but remedies by way of a personal judgment against the defendant may not be sought under this head).

(i) Actions under the Carriage by Air Act, 1932.

Firms trading in England are always amenable to the jurisdiction of the English Court.

A Limited Company if incorporated outside the United Kingdom must register at the Companies Registry the name and address of some person in England authorised to accept service of process on its behalf. (In the case of English companies it is good service to send or leave a writ at its Registered Office.)

Partnerships may be sued in the name of the firm, and service on the person in control of the business in England is sufficient.

LIMITATIONS ON JURISDICTION.

A.—The English Court has no jurisdiction where the subject-matter is **foreign land** (*e.g.*, a dispute over title or an action for trespass).

But sometimes a decree "*in personam*" against a defendant within the jurisdiction will be made under the Rule in *Penn* v. *Baltimore* (see IMMOVABLES, *post*, p. 84).

B.—The Courts will not enforce, directly or indirectly, a foreign **penal** or **revenue** law. *Re Visser* (1928).

Whether the foreign law is of this class is a question to be decided by the English Court. Hence the Courts will do nothing to **give effect** to (*e.g.*) the confiscatory legislation of another country,

Lecouturier v. *Rey* (the Chartreuse liqueur case), (1910)

But they cannot refuse to recognise a title validly acquired elsewhere under such a law.

Luther v. *Sagor* (1921).

C.—Where it would be contrary to the "policy of English law" to enforce a right, although it may have been validly acquired elsewhere,

e.g., Contracts in restraint of trade;

Agreements opposed to English principles of morality;

Hope v. *Hope* (1857).

Agreements induced by duress.

Kaufman v. *Gerson* (1904).

It is not, apparently, considered contrary to English public policy to enforce a gaming debt if it is enforceable in the country where it was contracted.

Quarrier v. *Colston* (1842).

Soc. Anon. du Touquet v. *Baumgart* (1927).

STAYING PROCEEDINGS.

An English action may be stayed at the suit of the defendant if an action on the same subject-matter is proceeding elsewhere.

But the plea (*lis alibi pendens*) will succeed only if the English proceedings are shown to be "clearly vexatious and oppressive".

It will hardly ever succeed unless the English plaintiff is the plaintiff in the foreign action.

Cohen v. *Rothfield* (1919).

The party seeking the stay must prove the existence of vexatiousness as a fact.

CRIMINAL JURISDICTION.

The English Courts have jurisdiction over

ALL crimes

A.—Committed in England.

B.—Committed on British ships.

C.—Committed on any ship in British territorial waters.
D.—Committed by a seaman employed on a British ship.
(Merchant Shipping Act, 1894.)

Certain crimes committed by **British subjects** in any part of the world;
e.g., Treason, murder, manslaughter and bigamy.

Piracy.—By the law of nations, pirates are justiciable in any State, irrespective of the nationality of the offenders or of the ship.

EXTRA-TERRITORIAL EFFECT OF ENGLISH JUDGMENTS.

An English judgment is **ineffective outside England** except
(a) In so far as it is recognised and enforced by the foreign Courts.
(b) (i) Under the **Judgments Extension Act, 1868**, a money judgment of the High Court may be extended by registration to Scotland and Northern Ireland; but the plaintiff may only levy execution upon a judgment so extended: he cannot, *e.g.*, issue a bankruptcy notice.
(ii) Under the **Inferior Courts Judgments Extension Act, 1882**, the provisions of which are similar to those of the last-mentioned Act, judgments of inferior Courts are made extendible by registration to Scotland and Northern Ireland.
(c) **On Bankruptcy.**—All the bankrupt's property, wherever situate, is declared to pass to the English Trustee (Bankruptcy Act, 1914.) (See BANKRUPTCY, *post*, p. 40.)
(d) **Company winding-up orders** are, by the Companies Act, 1929, declared to be effective in Scotland and Northern Ireland, as if the order had been made there.
(e) **Probate and Administration Grants** may be resealed for use in Scotland, Northern Ireland, and some other British Possessions. (See SUCCESSION TO MOVABLES, *post*, p. 43.)
(f) **A curator's powers** extend to the lunatic's movables and immovables in any British Possession (Lunacy Act, 1890).

FOREIGN JUDGMENTS.

It may be said to be the general rule that judgments of one country have no inherent force in any other country.

But in English law foreign judgments are recognised and made effective

1. At Common Law.
2. Under the provisions of the Foreign Judgments (Reciprocal Enforcement) Act, 1933.
3. Under the provisions of the Judicature Act, 1920. (Applicable only to British Dominion judgments.)
4. Under the Judgments Extension Act, 1868, and the Inferior Courts Judgments Extension Act, 1882. (Applicable only to the United Kingdom and Northern Ireland.)

1. **At Common Law** recognition is given to foreign judgments if the following conditions are satisfied. That is to say, the plaintiff can sue in England **upon the judgment**, in addition to his right to waive the judgment and sue again upon the obligation.

A. **Judgments in Personam**

if (i) Pronounced by a Court having **jurisdiction** over the defendant.

Jurisdiction over a defendant is deemed to exist if he was

(a) personally present in the forum when the action was commenced, *or*

(b) if he submitted to the jurisdiction, *e.g.*, by commencing the proceedings, or by previous express or inferred contract, or by a voluntary appearance. If the defendant appears, protesting the jurisdiction, but without any further step, in order to protect property directly threatened with seizure, this will not constitute a voluntary appearance. But if he contests the merits of the case, or the appearance is to save property liable to, but not immediately threatened with seizure, this will render the judgment binding on him.

Harris v. *Taylor* (1915).

(c) If the defendant was a subject of the country pronouncing the judgment. Dr. Cheshire is opposed to this proposition, which is supported by several *obiter dicta* but no binding decisions.

Gibson & Co. v. *Gibson* (1913).

The fact of the defendant being domiciled in the country of the forum does *not* automatically confer jurisdiction on the Courts of that country.

(ii) **Final and Conclusive**

i.e., unalterable in the Court which pronounced the judgment.

So an alimony order liable to be retrospectively varied upon subsequent application was held "not final".

Harrop v. *Harrop* (1920).

A judgment is considered to be "final" although it may be appealed from; but not if there remains unexpired a period during which execution was stayed, pending or in expectation of an appeal.

Scott v. *Pilkington* (1862).

(iii) For a **definite sum of money**—either fixed or mathematically ascertainable.

Beatty v. *Beatty* (1924).

(iv) **Not** induced by **fraud** practised by the plaintiff on the foreign Court.

"The defendant must impeach the judgment 'from without' . . . although it is not permitted to show that the foreign Court was mistaken, it may be shown that it was misled."

The Duchess of Kingston's Case (1776).

Allegations that the foreign Court had been misled by collusion, a false affidavit, or a forged will, have been held sufficient to support a plea of fraud.

Proof of perjured evidence is no defence, as

that would constitute an attack on the merits of the action : but it would be sufficient to prove that the plaintiff had procured false evidence.

Jacobson v. *Frachon* (1928).

But the principle that the merits of the action must not be impeached seems not to be definitely established. *E.g.*, in

Abouloff v. *Oppenheimer* (1882)

the defendant was allowed to make a plea of fraudulent conduct on the part of the plaintiff which he had unsuccessfully raised in the foreign Court. The defendant may allege that the foreign Court itself had been fraudulent.

Price v. *Dewhurst* (1837).

(v) Not contrary to English views of natural or substantial justice.

The defendant may plead that the procedure by which the foreign judgment was obtained would in English law be considered fundamentally irregular.

E.g., where no notice of the proceedings was given to the defendant.

Rudd v. *Rudd* (1924).

(vi) Not if the English Courts would refuse to entertain an action in respect of that subject-matter.

(See LIMITATIONS ON JURISDICTION, *ante*, pp. 4, 5.)

But an award of purely civil damages, although made in proceedings in which a criminal prosecution was combined with the civil judgment, has been held to be enforceable.

Raulin v. *Fischer* (1911).

A foreign judgment which complies with the above conditions will be conclusively recognised in England, and the plaintiff can bring an action upon the judgment to recover the sum adjudged due to him. The defendant can only plead the absence of one of the above essential conditions (when the onus is put upon him to substantiate his

allegation): he cannot impeach the judgment for an error either of fact or of law.

(Not even for an apparent mistake as to English law—

Godard v. *Gray* (1870).)

B. Judgments in rem.

A judgment of a foreign Court which finally determines the title to any property, movable or immovable, will be conclusively recognised in England if made in the country where the thing is situate.

Castrique v. *Imrie* (1870).

In Dicey's view such judgments can, like judgments *in personam*, be impeached in England upon an allegation of fraud practiced on the foreign Court. This view is supported by *dicta* in the above case.

2. **The Foreign Judgments (Reciprocal Enforcement) Act, 1933**, provides for the registration in England of the judgments of foreign countries (including British Dominions and Protectorates) to which the Act has been made applicable by Order in Council. Such Order in Council is not to be made unless the country concerned affords substantially reciprocal treatment to English judgments. In order to register a judgment under this Act the **plaintiff** must show that :—

(a) It is a judgment delivered by a superior Court in the foreign country.

(b) It finally and conclusively adjudges a sum of money to be payable to the plaintiff.

(c) It is not a penal or revenue decree. The **defendant** may then apply to have the registration set aside if he can show :—

(i) that the judgment is not one to which the Act applies, *or*

(ii) that the foreign Court acted without jurisdiction

[The rules which determine when a foreign Court is deemed to have jurisdiction over a defendant, for the purposes of this Act, are similar to those which confer jurisdiction on English Courts at Common Law (see *ante*, p. 7), except that nationality in the country of the forum is not

recognised as subjecting a person to the jurisdiction of its Courts.], *or*

(iii) that he was not sufficiently notified of the proceedings, *or*

(iv) the judgment was obtained by fraud, *or*

(v) the enforcement of the judgment would be contrary to English public policy, *or*

(vi) the rights under the judgment are not vested in the person who applied for registration.

If a judgment is registrable under this Act, no proceedings other than by way of registration can be entertained.

3. Under the **Administration of Justice Act, 1920.**

Judgments of **Superior Courts of British Dominions, Protectorates or Mandates** may be registered upon principles similar to those of the 1933 Act.

The 1933 Act may be extended to any such Dominion, etc., and thereupon the provisions of this Act will cease to apply to it.

4. The **Judgments Extension Act, 1868,** provides for the automatic registration in England of money judgments of the Court of Session in Scotland or the High Court of Justice in Northern Ireland. But the plaintiff may only proceed to enforce a judgment so extended by levying execution.

Money judgments of inferior Courts in Scotland and Northern Ireland may similarly be registered in England under the provisions of the Inferior Courts Judgments Extension Act, 1882.

Notice the reciprocal treatment afforded in these countries to English judgments. (See EXTRA-TERRITORIAL EFFECT OF ENGLISH JUDGMENTS, *ante*, p. 6.)

CHAPTER III.

PROCEDURE.

The CARDINAL RULE is that matters of procedure are governed by the **lex fori.** The following are the principal matters which in England are treated as **procedural** :—

(i) Mode of procedure.
(ii) The nature and extent of the remedy.
(iii) Limitations barring a right of action.
(iv) Evidence.
(v) Set-off and counterclaim (*i.e.*, whether the plea may be made in that action).
(vi) Execution of the judgment.

Notice :—

1. **Formalities.**—If some requirement of a **foreign system** by which a contract is governed is not complied with, it becomes necessary to distinguish whether such requirement relates to
substance (formal validity) *or*
procedure (proof of its existence).

If substantive.—The English Court will recognise that the contract does not comply with the requirements of the legal system by which it is governed, and is therefore invalid.

If procedural.—Compliance with the requirement is immaterial in English proceedings for the enforcement of the contract.

It may also become necessary to ascertain whether some similar requirement of **English law** (the *lex fori*) relates to substance or procedure.

In

Leroux v. *Brown* (1852)

it was held that the memorandum in writing required by the Statute of Frauds is evidentiary, *i.e.*, procedural.

As a result of this decision a contract valid by its proper law may be unenforceable in England through non-compliance with the statute.

2. **Limitation of an action by effluxion of time.**—If a right is alleged to be statute-barred by the foreign system under which it was acquired, it must be ascertained whether in such foreign law the effect of the limitation is—

(a) to extinguish the right (*i.e.*, it relates to substance, in which case the extinction of the right must be universally recognised);

(b) to bar the remedy (*i.e.*, it relates to procedure, in which case the rule is immaterial to an action for the enforcement of the right in England).

Harris v. *Quine* (1869).
Huber v. *Steiner* (1835).

The English Statutes of Limitation are procedural, and are therefore applicable to every action brought in the English Courts. The result frequently is that an obligation may be unenforceable in England although not barred by its proper law.

British Linen Co. v. *Drummond* (1880).

RENVOI.

In cases where English law decides that a question is to be governed by the **law of a foreign country** it may be uncertain what is to be understood by "the law of a country". This may mean :—

(a) the **internal** law of the country only—*i.e.* the ordinary rules applicable to its own subjects, *or*

(b) (i) the **whole** contents of the **foreign law**, including its rules for the choice of the law applicable in the particular circumstances; this is the "pure" renvoi doctrine, *or*

(ii) the English Courts are to "put themselves into the position of a Judge sitting in the foreign country"; this is known as "hybrid renvoi".

This classification is supported by Dr. Cheshire. Dicey, on the other hand, treats "renvoi" proper as being equivalent to what is here called "hybrid renvoi".

One advantage of "hybrid" over "pure" renvoi is that in the case of the latter it is possible for a question to be referred indefinitely from one system of law to another. This cannot happen in "hybrid renvoi".

The three possible alternatives may best be understood by an example :—

A testator, British by nationality, dies domiciled in France. In English law a testator's will is governed by the law of his domicil. By French law a person's will is governed by the law of his country of nationality.

If alternative (a) is applied, an English Court would test the will purely by the ordinary testamentary requirements of French law.

If the "pure renvoi" doctrine ((b) (i)) is adopted, the problem is incapable of a satisfactory solution—English law would refer to French law, accept a reference back, and so on *ad infinitum*.

If "hybrid renvoi" ((b) (ii)) is applied, the English Court will put itself in the position of a Judge sitting in France : As in "pure renvoi", it will refer the question to English law as the law of the testator's nationality, and find that the latter refers back to French law as the law of the domicil. The Court will then consider whether the French Court would or would not accept the reference back : if it would, the question will be decided in accordance with French internal law ; if the reference back would not be accepted, the question will be decided by English internal law.

Dr. Cheshire vigorously supports alternative (a) as being simplest and most logical, but the decisions in the following cases, although not conclusive, are in favour of the view that "hybrid renvoi" is applied in English law.

Collier v. *Rivaz* (1841).
Re Annersley (1926).
Re Askew (1930).
Re Ross (1930).

It should be noticed that in applying "hybrid renvoi"

(i) the primary question is whether renvoi is part of the foreign law ;

(ii) the question whether renvoi is part of English law does not arise.

A simple reference back to the *lex fori* (an example of which is illustrated above) is known as "ruckverweisung" (remission).

There may possibly be a remission to some third system of law—this is known as "weiterverweisung" or double-remission.

An instance of such double-remission is to be found in the case of

Re Trufort (1887).

PROOF OF FOREIGN LAW.

The contents of a foreign law must be proved as a fact in the English Courts, and the manner of such proof, like all questions of evidence, is governed by the *lex fori*.

The evidence must be given by an "expert witness", *i.e.*, generally, a lawyer who has had practical experience in the laws of the country in question; but the Court will sometimes accept the evidence of persons who have only studied those laws, or of non-legal officials such as consuls and diplomatic representatives.

Until the contrary is proved, foreign law is presumed to be the same as English law: the onus of proof rests therefore upon the party who pleads that it is different.

CHAPTER IV.

DOMICIL.

PERSONS.

The importance of ascertaining a person's domicil.

It is in accordance with the law of an individual's domicil that his personal rights are governed.

Every person must have one domicil, and only one.

Domicil is of two kinds :

(a) of origin;
(b) of choice.

A.—**Domicil of origin** (which is acquired by every person at birth).

The country in which a child is deemed to have his domicil of origin is determined by the following rules :—

(i) If legitimate, and born during his father's lifetime—that of the father.
(ii) If illegitimate or posthumous—that of the mother.
(iii) If a foundling—the country of finding.

B.—**Domicil of choice.**

A person acquires a domicil of choice by the **fact** of actual presence in a country, coupled with the **intention** to reside there permanently, or for an indefinite time.

If a person leaves his domicil, intending not to return to it, the position depends upon whether the country left was his domicil of origin or not :

A **domicil of origin** is not lost until a new domicil is acquired; but

A **domicil of choice** is lost, unless and until a new domicil is acquired the **domicil of origin** is **revived.**

There is a *prima facie* presumption that a person's domicil is in the country in which he is actually resident.

A domicil of origin is "of a more enduring character" than a domicil of choice; stronger evidence is necessary to prove the loss of a domicil of origin than of a domicil of choice.

Ramsay v. *Liverpool Royal Infirmary* (1930).
Winans v. *Att.-Gen.* (1904).

Evidence of domicil.—All relevant facts and circumstances must be considered: *e.g.*, length of residence, occupation (business or other objects of residence), mode of life, allegiance, friendships.

Declarations made by the individual concerned as to his domicil are admissible, but the circumstances under which they were made will be scrutinised, and the value of the statement will be heavily discounted if some "ulterior motive" is shown to exist.

Re Liddell-Grainger (1936).

Persons whose choice of residence has been involuntary or restricted.—Exiles, refugees, fugitives from justice, debtors, invalids, transported convicts, etc.

The circumstances imposing the restraint will be considered, to enable the Court to determine whether or not the person concerned had acquired a domicil in the country in which he had taken up residence.

The Court will particularly take into account the likelihood of the removal or termination of such restraint, and any available indications as to whether he intended to return to his country upon the occurrence of such event.

De Bonneval v. *De Bonneval* (1838) (French nobleman in exile).

Hoskins v. *Matthews* (1855) (invalid).

Domicil of persons under a disability—

Minors:

(a) If legitimate—domicil follows that of the father.
(b) If illegitimate—follows that of the mother.
(c) If the father is dead—generally follows that of the mother, but not invariably.

The child's domicil will not, for instance, be affected if the mother takes up residence in some other country in order to take advantage of a law of succession more favourable to herself.

Potinger v. *Wightman* (1817).

But the limits of this exception are uncertain.

(d) If born illegitimate, but legitimated by a subsequent marriage of his parents—

until legitimation, the child's domicil follows that of his mother,

upon legitimation, follows the father's domicil during the latter's lifetime.

(e) If an orphan—probably follows that of the guardian.

(f) If an adopted child—follows that of the adopting parent.

Married Women,

During the continuance of a valid marriage, are invariably deemed to possess the husband's domicil.

CORPORATIONS.

A corporation is deemed to be **domiciled** in the country in which the "Brains" which control its operations are situate.

Cesena Sulphur Co. v. *Nicholson* (1876).

It may be **resident**, however, in any country in which **any substantial business** is carried on.

Swedish Central Ry. v. *Thompson* (1925).

The fact of incorporation in a country, if no business is carried on there, will not constitute residence; nor will the preparation of lists and registers in that country, to comply with the requirements of the local law, be considered a business.

Egyptian Delta Land and Investment Co. v. *Todd* (1929).

The principal cases in which it becomes necessary to determine the nationality, domicil or residence of a corporation are as follows :—

(a) **Liability for taxation.**—In English Income Tax statutes, **residence** is made the basis of liability.

(b) **Jurisdiction.**—As in the case of individuals, residence is sufficient to confer jurisdiction.

By the Companies Act, 1929, the English Court always has jurisdiction over companies incorporated in England under the Act.

(c) **Its status in time of war.**—*I.e.*, whether or not the company has an enemy character. The domicil and not, as was formerly thought, the country of incorporation as such, will govern the company's status. The Court will, for this purpose, attempt to ascertain who are the persons who actually control the company.

Daimler Co. v. *Continental Tyre Co.* (1916).

COMMERCIAL (or TRADE) DOMICIL.

A person who resides or carries on trade in a country with which the British Empire is at war is said to have a Commercial Domicil there.

Such a person is treated in England as if he was a subject of a hostile State, and his property therefore is liable to seizure.

Where the commercial domicil attaches by reason of the person **carrying on business** in the enemy country—

(i) It is immaterial whether or not he is personally resident there.

(ii) Liability to seizure extends only to property held by him in connection with such business.

The Anglo-Mexican (1918).

The doctrine applies to British subjects and citizens of neutral countries, as well as enemy subjects.

The application to this doctrine of the term "domicil" has been criticised as misleading. There are two essential differences between domicil proper and commercial domicil.

The latter—

(i) may be multiple;

(ii) is acquired and lost "facto" and not "facto et animo".

The Indian Chief (1800).

CHAPTER V.

NATIONALITY.

Nationality is the relationship between a person and a State, whereby he is—

(a) accepted by that State as a subject, and receives rights as such (*e.g.*, protection, voting, etc.);

(b) owes to that State allegiance and other duties and liabilities which it may impose upon its subjects.

In contrast to domicil, a person may be accepted as a national by several countries simultaneously (double-nationality), or may be without nationality.

A person is a **natural-born British subject** in the following cases:—

A. If he was born within His Majesty's Dominions, or on board a British ship.

B. If he was born outside His Majesty's Dominions:—

1. **In** the case of persons **born before 1915**—
   (i) if his father or paternal grandfather was born in the British Dominions, *and*
   (ii) his father was, at the time of the child's birth, a natural-born British subject, and not in the service of an enemy State.
   (Naturalization Act, 1870.)

2. **In** the case of persons **born after 1915**—
   (i) If his father was, at the time of the child's birth, a British subject, *and*
   (ii) if his father was either—
      (a) born within His Majesty's Dominions, *or*
      (b) a person to whom a certificate of naturalization had been granted, *or*
      (c) a British subject by reason of annexation of territory, *or*
      (d) if the birth of the child was registered at a British consulate within one year of birth (or two years in special circumstances).

(**British** Nationality and Status of Aliens Acts, 1914—1933.)

British Nationality may be acquired—

1. By **annexation of territory** by the Crown.
2. By **naturalization** in accordance with the provisions of the British Nationality and Status of Aliens Acts, 1914—1933.

   Before 1933, a woman automatically became a British subject upon a certificate of naturalization being granted to her husband.

   Since 1933,—only upon making a declaration of her desire to acquire British nationality.
3. In the case of a woman, by marriage with a British subject.

British Nationality may be lost—

1. If the British territory in which the person is resident is annexed by, or ceded to a foreign State.
2. By marriage of a British woman to an alien.

   But the 1933 Act provides that, if the woman does not acquire her husband's nationality by reason of the marriage, she shall retain her British nationality.

   It should be noticed that the death of the husband or the dissolution of the marriage does not affect the nationality of the woman.
3. By naturalization in a foreign country.
4. By a "Declaration of Alienage".

   This can be made by a person of full age and not under any disability in three cases—

   A. If he was born within His Majesty's Dominions and at his birth or during minority became a subject of a foreign State in addition to his British nationality.

   B. If he was born out of His Majesty's Dominions, and acquired British nationality at birth under the rules applicable to such persons (see above).

   C. If he became a British subject during minority through the inclusion of his name in a certificate of naturalization granted to his father or widowed mother.
5. By revocation of a certificate of naturalization.

CHAPTER VI.

FAMILY LAW.

MARRIAGE.

There are two essential requirements necessary to constitute a valid marriage :

A.—That the parties should have capacity to marry.

B.—That the forms and ceremonies of the place of celebration should be complied with.

A.—CAPACITY.

1. There is some disagreement among the authorities as to the rules governing capacity to marry.

Dicey maintains that the law of each party's domicil governs his or her capacity : to this rule he makes two " exceptions " applicable to marriages celebrated in England.

Dr. Cheshire objects to Dicey's statement of the law. His view has the advantage of being more logical and more conformable to the existing decisions than that of Dicey.

It is that the capacity of both parties to enter into the marriage must be tested by the law of the matrimonial domicil (*i.e.*, the husband's pre-marriage domicil).

Thus an incapacity attaching to the wife by the law of her pre-marriage domicil, where this is neither the husband's domicil nor the place of celebration, is immaterial.

Mette v. *Mette* (1859).
Brook v. *Brook* (1861).
Sottomayor v. *De Barros* (*No.* 1) (1877).
Sottomayor v. *De Barros* (*No.* 2) (1879).

The last case is of particular importance, as being the only one in which the wife's pre-marriage domicil was neither that of the husband nor the country where the ceremony took place.

The incapacity may consist in the lack of some consent required by the law of the domicil of one of the parties.

The Court must in that case determine whether the nature of the consent required is—

(a) formal, *or*

(b) absolute.

(a) An example of a formal consent is to be found in the case of

Simonin v. *Mallac* (1860)

where the effect of the consent being withheld was to postpone the marriage for a fixed period, and not to prohibit it altogether. If the consent required is of this kind, its absence is immaterial to the celebration of a marriage in England, as formalities are governed exclusively by the law of the place of celebration. (See below.)

(b) An absolute consent is an essential, the absence of which constitutes an incapacity : whether or not it will invalidate a marriage must be decided by the rule as stated above.

2. Both parties must also possess the necessary capacity by the law of the place of celebration.

B.—FORMALITIES.

All formalities (including questions as to the necessity and form of a religious service) are governed exclusively by the law of the place of celebration.

Scrimshire v. *Scrimshire* (1752).

Exceptions.

1. British subjects may be married abroad in accordance with English forms under the provisions of the Foreign Marriages Act, 1892. If only one of the parties is a British subject, the marriage officer must be satisfied that—

(a) no facilities exist by the local law; *and*

(b) if the woman is a British subject, that the marriage will be recognised as valid by the law of the husband's country.

2. When both parties are foreign nationals, they may marry in the Embassy or Consulate of their country according to their national forms. This is known as exterritoriality.

3. In countries where local formalities are non-existent or inappropriate for a marriage of British subjects, apparently mere consent will suffice.

Catterall v. *Catterall* (1847).

The position in England of persons whose marriage is, by the laws of their matrimonial domicil, governed by rules which conflict with English conceptions of marriage.

(Non-Christian and Polygamous unions.)

In English law, marriage is essentially monogamous, and, at least to a considerable extent, indissoluble. Difficulty has arisen, therefore, in dealing with unions which are polygamous, or which are dissoluble at the will of both parties, or by some unilateral act of one party.

The following principles have been established :—

1. For certain purposes (*e.g.*, legitimacy of children) English law will recognise the state of marriage between persons by the law of whose matrimonial domicil a polygamous marriage is legal.
2. If a marriage is contracted with rites appropriate to a polygamous union, the parties are conclusively presumed to have married according to the law governing that form of marriage in the country of celebration.

   Re Bethell (1887).

3. It is now decided that indissolubility is not of the essence of a marriage—

   Thus recognition in England was given to a Russian marriage (at that time dissoluble without legal proceedings at the request of either party).

   Nachimson v. *Nachimson* (1930).

4. English Courts will not entertain suits for the annulment or dissolution of polygamous marriages. (—" machinery designed for monogamous marriages only ",)

   Hyde v. *Hyde* (1866).

MATRIMONIAL CAUSES.

1. NULLITY.

Nullity suits fall into two classes—

A. When the marriage is alleged to be **void ab initio** (*e.g.*, for bigamy, incapacity or non-observance of necessary formalities).

B. When the suit is to annul an existing marriage (on the ground of impotence or one of the new grounds created by the Matrimonial Causes Act, 1937, s. 7 (1)).

A.—Void Marriages.

Jurisdiction may be exercised by the Courts either—

(i) of the matrimonial domicil

Salvesen's Case (1927)

De Massa v. *De Massa* (1931), or

(ii) of the place of celebration

Mitford v. *Mitford* (1923).

For the purpose of bringing an action for nullity, a woman who goes through an invalid (here bigamous) form of marriage is not deemed to acquire the domicil of the man: she may therefore sue in the country where she is domiciled.

White v. *White* (1937).

B.—Voidable Marriages.

There is jurisdiction only in the Courts of the matrimonial domicil.

Inverclyde v. *Inverclyde* (1931).

In neither case does residence alone confer jurisdiction.

2. DIVORCE.

Jurisdiction resides primarily in the Courts of the country of the matrimonial domicil—residence is insufficient to confer jurisdiction.

Le Mesurier v. *Le Mesurier* (1895).

But the English Courts will recognise the validity of any decree which the Courts of the matrimonial domicil will consider effective.

Armitage v. *Att.-Gen.* (1906).

In this case, a decree made in South Dakota was held to be effective, because it was recognised by the Courts of New York State, where the parties were domiciled.

An exception is created by section 13 of the Matrimonial Causes Act, 1937. A deserted wife may petition for dissolution of marriage, nullity, restitution of conjugal rights, or judicial separation in the English Courts if, immediately before the desertion, the husband was domiciled in England or Wales.

By the Matrimonial Causes Act, 1857, the English Courts always have jurisdiction over a co-respondent, wherever he is domiciled or resident.

Some doubt exists as to the position of divorces not by way of legal process :—

In the cases of

Sasson v. *Sasson* (1924) and
Spivack v. *Spivack* (1930)

"letters of divorce" under Jewish Rabbinical law (a form of divorce permitted in the matrimonial domicil) were recognised as effective.

Presumably Russian divorces (by mutual consent) would also receive recognition.

But where the marriage was celebrated in England with English forms, it was held not capable of being dissolved by Mahommedan forms, although the husband was domiciled in India. *Hammersmith Marriage Case* (*Ex p. Mir-Anwaruddin*) (1917).

Prohibitions against re-marriage.

1. If (as in English procedure) a period suspending the operation of the decree is fixed, the English Courts will recognise that the marriage is not finally dissolved until the expiration of such period, and give effect to such prohibition.
2. If any prohibition is imposed by the foreign country (generally on the guilty party) of such a nature as to be construed as a penalty it may be disregarded.
Scott v. *Att.-Gen.* (1886).

3. JUDICIAL SEPARATION and
4. RESTITUTION OF CONJUGAL RIGHTS.

As in the cases of Nullity and Divorce, jurisdiction resides in the Courts of the country of the matrimonial domicil.

But as the status of the parties is not affected, the Courts of any country in which they are resident are competent to pronounce a decree of judicial separation or restitution of conjugal rights.

THE EFFECT OF MARRIAGE ON PROPERTY.

A.—Where there is a Marriage Settlement.

1. **Capacity** to settle property depends upon each party's pre-marriage domicil.

   Re Cooke's Trusts (1887).
   Cooper v. *Cooper* (1888).

2. A Marriage Settlement which is **implied** by the law of the matrimonial domicil is on the same footing as if the contract had been express.

   De Nicols v. *Curlier* (1900).

3. The contract will be **construed** in accordance with its **proper law** (the law with which the contract is most closely connected).
   This is presumed to be—
   (i) the law by which the parties declare that it shall be governed: *or*, if no such provision is made,
   (ii) the law of the matrimonial domicil.

   Re Fitzgerald (1904).

4. The **formalities** of the contract and the **parties' rights** under it are governed by the "**proper law**".
   Van Grutten v. *Digby* (1862) (formalities).
   Viditz v. *O'Hagan* (1900) (right of revocation).

The contract subsists throughout the continuance of the marriage, and is not affected by a subsequent change in the matrimonial domicil.

De Nicols v. *Curlier* (1900).

B.—Where there is no Marriage Settlement.

The rights of the spouses are governed by the law of the place where they are domiciled at any given time.

Their domicil at the time of the marriage is immaterial.

Lashley v. *Hogg* (1804).

Immovables are, however, governed exclusively by the **lex situs**.

Welch v. *Tennent* (1891).

LEGITIMACY.

1. A child is recognised to be **legitimate** if he is legitimate by the law of his domicil of origin (see DOMICIL, *ante*, p. 16).

The place of the child's birth, or of the celebration of the marriage, is immaterial.

2. **Legitimation "per subsequens matrimonium".**—The rules governing legitimation by subsequent marriage are contained in the Legitimacy Act, 1926.

Section 1.—Where the father is at the date of the marriage domiciled in England or Wales:

the child shall be legitimated by a subsequent marriage of his parents, provided that neither of his parents was married to a third person at the time of the child's birth.

Section 8.—Where the father is at the date of the marriage domiciled outside England or Wales:

the child shall be considered legitimated if he became legitimated by the law of the domicil of the father at the time of the marriage.

The father's domicil at the time of the child's birth is immaterial.

A legitimated child born abroad of a British father was held not to be a natural-born British subject because he was not, within the meaning of the British Nationality Act, 1730, a "son" of his father at the time of his birth.

Abraham v. *Att.-Gen.* (1934).

Presumably the result would be the same under the British Nationality and Status of Aliens Acts, 1914—1933.

CHAPTER VII.

CONTRACTS.

CAPACITY.—Mercantile contracts (as opposed to contracts of marriage) are governed by the rule in

Male v. *Roberts* (1800)

which decides that the law of the place where the contract was made, and not the law of the contracting party's domicil, governs his capacity.

Although there is no positive authority on the point, the modern tendency favours the view that it is the "proper law" and not the *lex loci contractus* as such which governs a person's capacity to contract.

FORMALITIES.—As in the case of capacity, it is not authoritatively settled whether formalities are governed by the "proper law" or the *lex loci contractus* as such.

Dicey supports the *lex loci contractus*, but admits a possible exception in the case of contracts to be performed outside the country in which they were made.

Dr. Cheshire suggests that the true interpretation of the existing decisions is that it is the modern principle of "proper law" which is meant when the *lex loci contractus* is referred to.

He submits that the true position is that formalities must comply either with the proper law or with the *lex loci contractus*.

It is important to distinguish between requirements which relate to the formation of a contract, and those that relate to proof of its existence. (See PROCEDURE, *ante*, p. 12.)

MATERIAL (or Essential) VALIDITY and INTERPRETATION

of a contract are governed by its **proper law.**

The "proper law" is that system of law by which the parties are considered to have intended their contract to be governed.

Factors to be taken into consideration in determining the proper law :—

(a) Any system of law declared in the contract to be

applicable is almost conclusively presumed to be its "proper law".

But if the contract has **no internal connection** with that system, the expressed intention of the parties may be disregarded. *A fortiori* if that system is made applicable because the contract would be invalid if tested by the law with which it is most closely connected.

The Torni (1932).

(b) **The lex loci contractus.**

In the majority of cases the contract is most closely connected with the place where it was concluded, and this will therefore be its proper law.

A contract completed through the post is made at the place where the letter of acceptance is posted. In some cases, as, for instance, when the sender posts the letter while passing through a country on a voyage, the *lex loci contractus* may have no connection whatever with the contract. In such a case it will have no claim to be considered the proper law of the contract.

(c) **The law of the place where the contract is to be performed.**

The law of the country where all or a substantial part of the contract is to be performed is almost conclusively presumed to be the proper law if the contract was also made there.

P. & O. v. *Shand* (1865).

(d) In **maritime contracts**—(affreightment, bottomry bonds, etc.) there is, in some cases, a presumption that the **law of the flag** of the ship in question is the proper law of the contract.

Lloyd v. *Guibert* (1865).

This presumption is particularly applicable when a ship, the nationality of which is known to the parties, is an essential part of the subject-matter of the contract; on the other hand, it is inapplicable if any parties (*e.g.*, indorsees of a bill of lading) contracted without knowledge of the ship's nationality.

The Industrie (1894).
The Njegos (1935).

(e) That system of law which is **most effective.** If a contract is valid by one, and illegal by another of two systems having competing claims to be its proper law, this fact will be taken into account to create a presumption in favour of the law by which the contract is valid.

P. & O. v. *Shand* (1865).

In addition to the above, the Court will take into account every fact which might indicate the system of law by which the parties intended their contract to be governed—

e.g., the domicil, residence and nationality of the parties; the language and form of the contract.

ILLEGALITY.

A contract will not be enforced if it is illegal if tested by either

(a) its **proper law**

Heriz v. *Riera* (1840) or

(b) the law of the place where the contract is to be performed

Ralli Bros. v. *Compania Naviera* (1920).

The *lex loci solutionis* as such is not material. English Courts will refuse to enforce contracts which are "contrary to English conceptions of 'public policy'", although the contract may have no connection with this country and be lawful by its proper law and by the law of the place of performance.

(See LIMITATIONS ON JURISDICTION, *ante*, p. 5.)

Until recently, penal and revenue laws of a foreign country which made the contract illegal were **disregarded** by the English Courts: but it is thought that changed conceptions of international comity may cause a different view to be adopted in the future. It is submitted that the result of the old cases represents an unjustifiable extension of the principle that English Courts should not **enforce** such laws.

DISCHARGE.

Discharge of a contract is governed solely by its **proper law.**

If discharge by effluxion of time is pleaded, it is material to ascertain whether the effect of the law governing the contract is to bar the **right** or the **remedy.** (See PROCEDURE, *ante*, p. 13.)

CHAPTER VIII.

THE LAW OF PROPERTY.

In Private International Law there is a fundamental division of property into **movable** and **immovable.**

This division is recognised in English law, and exists concurrently with the English classification into realty and personalty.

Whether the thing is a movable or an immovable is determined by the **lex situs.**

Re Berchtold (1923).

This case also illustrates the distinction between the realty-personalty and movable-immovable classifications.

IMMOVABLES.

The cardinal rule is that **immovables are governed by the lex situs.**

The following are so governed:—

Capacity to transfer, deal with, or acquire rights.

Formalities and **Essential Validity** } of wills and dispositions *inter vivos.*

Involuntary devolution.—The effect on immovables of the owner's death, marriage, or bankruptcy. Rights of infants' guardians, etc.

Prescriptive rights.

EXCEPTIONS.

Interpretation of Wills.—The question of how a will of immovables is to be construed is dealt with below (see SUCCESSION TO IMMOVABLES, *post*, p. 47).

Contracts.—Contractual obligations *in personam* (as opposed to the creation and transfer of rights *in rem* over the

immovable) are governed by the proper law of the parties' contract.

British South Africa Co. v. *De Beers* (1910, 1912).

Jurisdiction resides exclusively in the Courts of the *situs*.

So the English Courts will refuse to entertain actions in respect of torts (*e.g.*, trespass) committed against foreign immovables.

British South Africa Co. v. *Companhia de Moçambique* (1892, 1893).

Exception:

The rule in Penn v. *Lord Baltimore* (1750).

An English Court, in the exercise of its equitable jurisdiction "*in personam*" over a defendant who is within the jurisdiction, may make a decree affecting foreign land:

But the rule is strictly limited to cases of

(i) contract,
(ii) fraud, *or*
(iii) trust.

There must be a "personal equity binding the conscience of the defendant", and some privity of obligation between the parties.

Cranstown v. *Johnston* (1796).
Norris v. *Chambres* (1861).

The Court will refuse to make a decree which would be contrary to the *lex situs*, and would, therefore, be ineffective.

MOVABLES.

PARTICULAR ASSIGNMENT.

1. TANGIBLE MOVABLES.

In Dicey's view, the transfer of a tangible movable must generally be tested by the *lex situs*: but he adds that if a transfer is valid by the law of the owner's domicil, or by the *lex actus*, it may be presumed to be effective everywhere.

The combined effect of these rules is too vague to represent a considered conclusion on the result of the authorities.

Dr. Cheshire's statement of the law is more detailed and logical.

A.—When the dispute is between two parties to a transfer, the proper law of their contract governs their rights *inter se*.

It is clear, however, that formalities required by the *lex situs* must be complied with before the property in the movable can be considered to have passed to the transferee.

Unless such formalities are complied with, the transferee has only a contractual right "*in personam*" against the transferor to have the transfer completed.

B.—Rights of a person claiming under one of the original parties to a contract will, as against the other of the original parties, be governed by the proper law of the original contract.

Inglis v. *Usherwood* (1801).

C.—A completed title, validly acquired by the *lex situs*, will prevail against adverse rights acquired elsewhere.

Cammell v. *Sewell* (1858, 1860).
Inglis v. *Robertson* (1896).

The case of

Freeman v. *East India Co.* (1822)

necessitates a possible qualification—that the transferee must have taken in good faith and without notice of the inconsistent rights of other persons. This qualification is, however, almost certainly restricted to cases in which the transferee was, at the time of the transfer, personally subject to the equitable jurisdiction of the English Courts.

The acquisition of a title to movables under judicial or executive decrees of the *situs* places the transferee in a particularly strong position.

Castrique v. *Imrie* (1870).
Luther v. *Sagor & Co.* (1921).

It seems uncertain to what extent, if at all, the rule "*mobilia sequuntur personam*" applies, so as to make the law of the owner's domicil govern particular assignment of his movables.

The application of this rule would be likely to inflict hardship upon persons who accept transfers of the goods in the country where they are situate. Such transferees might be ignorant of

the owner's domicil, and it would therefore be unreasonable to subject the transfer to that system of law.

An assignee in the country where the goods are situate receives some protection from the rule that, wherever the owner is domiciled or the transfer is made, no transfer can be recognised in the *situs* unless the requirements of the local law as to formalities (execution and registration of documents, etc.) are complied with. *Dulaney* v. *Merry & Son* (1901).

DONATIONES MORTIS CAUSA.

It has been decided that a *donatio mortis causa* follows the rules applicable to a transfer *inter vivos*, and not those of testamentary disposition. *Re Korvine* (1921).

C

2. INTANGIBLE MOVABLES.

A.—Debts.

It appears to be so far not conclusively settled by what system of law an assignment of debts must be governed.

Dicey's statement of the rules reflect the uncertainty felt by him as to the true position.

He states that if a debt is assigned in the *situs*, the law of that country governs the transfer. If the assignment is made elsewhere than in the *situs*—

(a) the validity of the assignment and, possibly, the formalities, are governed by the *lex loci actus* OR the law of the parties' domicil.

(b) the liabilities of the debtor are determined by the law governing the contract between him and the creditor.

Dr. Cheshire draws the following inferences from a detailed examination of the existing authorities :

Capacity of the parties to an assignment *and*

Formalities of the assignment

appear to be governed either by the *lex loci actus* as such, or by the proper law of the assignment—the law of the domicil of the parties and of the place where the debt is situate being immaterial. *Republica de Guatemala* v. *Nunez* (1926, 1927).

This view is supported by a predominating number of Judges, but the position is complicated by several decisions in which the *lex situs* is made to govern the form of the assignment.

Essential validity.—In the important case of

Re Anziani (1930)

the validity of the assignment was made to depend upon the *lex loci actus* as such: but Dr. Cheshire submits that this system of law was selected as being the proper law of the assignment.

Priorities between assignees:

The **debtor** can be affected only by an assignment valid and complete by the proper law of the original debt (which need not necessarily be the *lex situs* of the debt).

Kelly v. *Selwyn* (1905).

Involuntary assignment. — (The attachment by judicial process of choses in action).

(a) *Effective proceedings can be instituted only in* the country where the debt is situated (*i.e.*, where the debt is recoverable).

(b) The transfer and all questions of priorities between creditors are governed by the *lex situs*.

Re Queensland Mercantile and Agency Co. (1891).

For the rules for the determination of the *situs* of debts, see *post*, p. 48.

B.—Negotiable Instruments.

The English law is codified in the Bills of Exchange Act, 1882.

Formal Validity.

(a) **On Issue:** validity as regards form is determined by the law of the place of issue.

"Issue" means the first delivery of a complete bill to a person taking as holder.

(b) **On supervening contracts:** the formal validity of a bill is determined by the law of the place where the acceptance indorsement or indorsement *supra protest* is made.

Provisoes for bills issued out of the United Kingdom.

(i) The bill is not to be considered invalid only because not stamped in accordance with the law of the place of issue.

(ii) If the bill is valid as regards **form by English law**, payment may be enforced as between all persons who negotiate, hold or become parties to it in the United Kingdom.

Interpretation of drawing, acceptance or indorsement is determined by the law of the place "where such contract is made", *i.e.*, the *lex loci actus*. There is strong judicial support for the view that "interpretation" includes "legal effect".

Koechlin v. *Kestenbaum* (1927).

"Inland bills" are subject to the following proviso:

As regards the payer indorsements shall be interpreted by the law of the United Kingdom, *i.e.*, an acceptor of an inland bill is liable only to holders who claim under an indorsement valid by English law.

An inland bill is one which is either—

(i) drawn and payable within the British Isles, *or*

(ii) drawn within the British Isles upon some person resident there.

Presentation, Protest and Dishonour.—The duties of the holder are determined by the law of the place "where the act is done or the bill is dishonoured". The meaning of the words "where the act is done" is obscure: as it stands the provision is nonsensical.

Dicey thinks the clause should read "where the act is to be done".

Dr. Cheshire suggests that the law of the place where the bill is payable governs these matters, as it did before the Act.

The *lex loci solutionis* is also favoured by Westlake and Foote.

Rate of Exchange.—If the bill is drawn out of the United Kingdom but payable within the United Kingdom,

and the amount is expressed in a foreign currency, such amount is to be calculated according to the rate of exchange on the day the bill is payable, unless a provision to the contrary is contained in the bill.

Due date.—The date on which a bill is payable is determined by the law of the place of payment.

C.—Shares.

1. **Effect of a transfer as against the Company.**

The company will not be affected (*i.e.*, it is not bound to recognise the validity of a transfer) unless the requirements of the law of the country to which the company is subject are complied with.

2. **Effect of a transfer as between transferor and transferee.**

The *lex loci actus* governs the personal rights of the parties.

Colonial Bank v. *Cady* (1888, 1890).

CHAPTER IX.

BANKRUPTCY.

A.—ENGLISH BANKRUPTCY PROCEEDINGS.

The law is consolidated in the Bankruptcy Act, 1914.

The English Court has no jurisdiction unless there is :

(a) An "Act of Bankruptcy", *and*

(b) A "Debtor"—who may be a person (whether a British subject or not) who at the time of the act of bankruptcy

(i) was personally resident in England, *or*

(ii) ordinarily resided or had a place of residence in England, *or*

(iii) was carrying on business in England personally, or by an agent or manager, *or*

(iv) was a member of a firm or partnership carrying on business in England.

If the petition is presented by a creditor the debtor must *also*

(i) be domiciled in England, *or*

(ii) have been ordinarily resident in England within the last year, *or*

(iii) have carried on business in England personally or by agent or manager, *or*

(iv) within the last year have been a member of a firm or partnership carrying on business in England.

The jurisdiction of the English Courts is not affected by bankruptcy proceedings against the debtor in foreign countries.

Upon adjudication, the English trustee becomes entitled to all the debtor's movable and immovable property, wherever situate. The debtor can be compelled to execute all necessary instruments to effect the vesting in the trustee of any property, wherever situate.

If a creditor seizes any property of the bankrupt in a foreign country—

(a) If he desires to prove in the English proceedings he must bring into account everything that he has received:

Banco de Portugal v. *Waddell* (1880).

(b) In some cases a creditor will be compelled to hand over to the English trustee the property so seized, but some doubt exists as to the state of the law on this point, which rests largely on three old cases:

Hunter v. *Potts* (1791)
Sill v. *Worswick* (1791)
Phillips v. *Hunter* (1795).

Dicey's inferences from these cases are—

(i) if the seizure is made by legal process with notice of the proceedings in England, the creditor cannot be compelled to disgorge;

(ii) if the seizure is made without legal process, or by legal process but without notice of the English proceedings, the criterion is probably whether or not the foreign law recognises the title of the English trustee.

Dr. Cheshire's view is that the creditor can be compelled to disgorge in favour of the English trustee if the creditor was, at the time of the seizure of the property, subject to the bankruptcy jurisdiction of the English Court.

Administration.—English bankruptcy proceedings, in common with all matters of procedure, are governed solely by the *lex fori*.

B.—FOREIGN BANKRUPTCY DECREES.

1. **Scottish, Irish and Dominion decrees** are recognised in England (English decrees receive reciprocal recognition throughout the British Empire).

2. **Decrees of other countries.**

(i) **English immovables** are not automatically affected by a foreign decree.

But the English Court has a discretion to appoint the foreign trustee a receiver of the bankrupt's English immovables.

Re Kooperman (1928).

(ii) **Movables.**—A decree made in foreign bankruptcy proceedings is recognised in England as an **assignment**

tō the foreign trustee of all the movables of the bankrupt, wherever situate.

Solomons v. *Ross* (1764).

It is not necessary that the decree should have been made in the bankrupt's domicil, provided that

(a) the debtor must have been a party to the proceedings.

Re Anderson (1911).

(b) English movables will only pass subject to any incumbrances which are recognised by English law.

Galbraith v. *Grimshaw* (1910).

(c) The assignment operates only to the extent to which the *lex fori* provides for extra-territorial application of the decree.

DISCHARGE.

English Decrees.—An order of the English Bankruptcy Court discharging the debtor from any debt or liability will be recognised throughout the British Dominions.

Irish and Scottish orders of discharge are recognised in England.

Foreign Decrees.—The debtor will be recognised in England as discharged from the debt only if the order is pronounced in the country where the debt was contracted, or where payment should be made.

Gibbs v. *Société Industrielle* (1890).

It is generally agreed among modern writers that the law as stated in this case represents the modern conception of the "proper law" of a contract.

CHAPTER X.

SUCCESSION.

I.—TO MOVABLES.

Jurisdiction to grant administration resides in every country where there are assets of a deceased person. The following rules are applicable for the determination of the situation of intangible movables :—

Simple debts: the residence of the debtor at the time of the deceased's death.

Judgment debts: the country of record.

Securities transferable by registration: the place where the register is situate.

Securities transferable by delivery, Bills of Exchange, and **Specialty debts.** } the place where the instrument is situate.

Effectiveness.—Administration grants have, generally, no extra-territorial effect. An administrator must apply for a grant in every country where the deceased left property.

English assets can accordingly be dealt with only by an administrator appointed by the Probate Court. The Court has a limited discretion as to whom to appoint: but a foreign administrator (especially if of the deceased's domicil) will, if practicable, be appointed.

Re Hill (1870).

Scottish, Northern Ireland and certain **Dominion** grants may be resealed in England, and thereby made effective with regard to the English estate of the deceased: Judicature Act, 1925, and Colonial Probates Acts, 1892 and 1927. (For the resealing of English grants, see "Extra-territorial Effect of English Judgments", *ante*, p. 7.)

It is important to note the distinction between **administration** and **distribution.**

Administration includes the payment of debts and death duties and the discharging of all incumbrances on the estate.

Distribution means the division of the estate, administration having been completed, among the persons entitled to it.

ADMINISTRATION is governed entirely by the *lex fori*. A creditor may seek payment of his debt in any country where the deceased left assets: but his claim will in all cases be governed by the *lex fori*. *Re Lorillard* (1922).

An **ancillary administrator**, after discharging the duties and incumbrances payable in the *situs*, is generally obliged to remit surplus assets to the principal administrator (that of the deceased's domicil). *Re Achillopoulos* (1928).

But in special circumstances (*e.g.*, where all the beneficiaries are domiciled or resident here) the English ancillary administrator may be directed to distribute the assets in his hands without remitting them to the principal administrator.
Re Lorillard (1922).

Note.—The term "administrator" has been used above to include all personal representatives.

DISTRIBUTION.

A.—On Intestacy.

Succession rights are governed by the *lex domicilii* of the deceased.

Caduciary rights.—Where there are no relatives entitled, rights over *bona vacantia* are governed by the **lex situs.** *Re Barnett's Trusts* (1902).

B.—Testamentary Succession.

The general rule is that the validity of a will (testamentary capacity, form and substance) must be governed by the domicil of the testator at the **time of his death.**

As a result of the hardship caused in several cases in which wills were held to be invalid by the strict

application of this rule, the Wills Act, 1861 (Lord Kingsdown's Act), was passed.

It provides that wills of **personalty** of **British subjects**, wherever domiciled, shall be, in England, Scotland and Ireland, held to be valid if made in accordance with the following forms :—

(a) If the will is made **out of the United Kingdom**—
  (i) of the place of execution, *or*
  (ii) of the testator's domicil at the time of making the will, *or*
  (iii) of that part of His Majesty's Dominions where the testator had his domicil of origin.
(b) If the will is made **within the United Kingdom**—
  of the place of execution.

Change of domicil.—At common law, as has been stated, the will was governed by the law of the testator's domicil at the time of death. A will was therefore invalidated if, after making it, the testator changed his place of residence and died domiciled in a country by the law of which the will lacked form.

Lord Kingsdown's Act, in addition to the provisions mentioned above, expressly declares that "no will is to become invalid by reason of any subsequent change of domicil by the testator". Although there is some conflict of opinion on the point, the better view seems to be that this section (section 8) applies to wills of **foreign** as well as British subjects.

Re Groos (1904).

Marriage.—The effect upon a person's will of his or her subsequent marriage is governed by the law of the husband's domicil at the time of the marriage.

Re Martin (1900).

Construction of Wills.—There is little doubt that the **system of law intended by the testator** is allowed to govern the interpretation of his will.

There is a strong presumption that the will was made by reference to the law of the testator's domicil.

Re Cunnington (1924).
Re Fergusson (1902).

But the Court will consider evidence in favour of some other system of law—particular attention will be paid to any technical terms employed in the will.
Studd v. *Cook* (1883).

POWERS OF APPOINTMENT CREATED BY ENGLISH INSTRUMENTS.

1. A power may be validly exercised by will although the testator has no testamentary capacity by the law of his domicil, provided he has capacity by English law.

2. The appointment is good if the form of the will complies with:

(a) Any system of law by which the donee may validly make his will, *or*
English internal law, *and*

(b) The additional formalities (if any) required by the instrument creating the power.

The provision of section 10 of the Wills Act, 1837, under which non-compliance with any special formalities regarding execution and attestation imposed by the donor is made immaterial, applies only to wills the validity of which falls to be tested by English internal law.

The Essential validity of an appointment depends upon whether the power is general or special.

The operation of a special power depends upon the law which governs the instrument by which the power was created.

The operation of a general power depends upon the law which governs the will.

Re Prycc, Lawford v. *Pryce* (1911).

The ordinary rule that the will must be construed in accordance with the law intended by the testator applies.

It has been decided that section 27 of the Wills Act, 1837, by which personal property over which the testator had a general power will pass on a residuary bequest of personalty unless a contrary intention appears in the will, applies to the will of a donee of an English power, by whatever system of law the will is governed.

Re Price, Tomlin v. *Latter* (1900).
Re Simpson (1916).

II.—TO IMMOVABLES.

A.—On Intestacy.—Succession rights are governed by the **lex situs.** The deceased's domicil is immaterial.

B.—Testamentary Succession.

Testamentary Capacity, Form and Material validity of the will } are governed by the **lex situs.**

Construction.—Dicey says that a will of immovables must be construed by the law of the domicil of the testator at the time the will was made.

Dr. Cheshire takes a slightly different view—he supports the system of law intended by the testator.

As in the case of movables, however, there is a strong presumption that the testator intends his will to be governed by the law of his domicil. If construction in accordance with the system of law intended by the testator results in a disposition not permitted by the *lex situs*, the will may then be construed in accordance with the *lex situs*.

Election.—The question of election arises when a valid gift or devise of some property is made to an heir of immovables, and the same will contains an **invalid** devise of those immovables to some other person.

An **English heir-at-law** before the 1925 Property statutes was not compelled to elect—he could take the gift or devise under the will, as well as the immovables to which he succeeded.

Re de Virte (1915).

The question has not yet fallen to be decided whether a person entitled on the owner's intestacy under the Administration of Estates Act will be similarly favoured.

An heir to foreign immovables will be compelled to elect if the law of the *testator's domicil* so requires.

Re Ogilvie (1918).

CHAPTER XI.

GUARDIANSHIP OF INFANTS.

Rights in England of a foreign Guardian.

The early doctrine of the English Courts, as laid down in

Johnstone v. *Beattie* (1847)

was that a guardian appointed in the minor's domicil had no authority over the minor's person or property. The English Court claimed exclusive jurisdiction over minors present in England, and would recognise no guardian unless his appointment was made or confirmed by it.

This view has been considerably modified, and, as shown by the more recent cases of

Nugent v. *Vetzera* (1866) and
Monaco v. *Monaco* (1937)

the rights of the domiciliary guardian to the custody and control of the infant's person and property will be recognised.

In accordance with the principle of the Chancery Court that the minor's welfare is to be primarily considered, the Court will be prepared to entertain all objections to the suitability of the domiciliary guardian; but these objections must be of considerable weight for the Court to consider itself justified in interfering with the guardian's authority.

De Savini v. *Lousada* (1870).

There is apparently no decision as to whether the English Court will recognise a guardian appointed outside the minor's domicil.

Dicey's view is that his authority will not be recognised unless recognition would be accorded to it by the Courts of the minor's domicil.

CHAPTER XII.

LUNACY.

Jurisdiction of the English Court exists in all cases where
(a) the lunatic is personally present in England;
(b) there is property in England the administration of which is disputed.

Rights of a Curator appointed in a foreign country.

A.—**Rights to English movables.**

(a) **Stock.**—By the Lunacy Act, 1890, a person appointed curator in a country in which the lunatic is **resident** is entitled to all stock possessed by the lunatic.

(b) **Other property.**—A person appointed in a country in which the lunatic is **domiciled and resident** is generally entitled to have the property transferred to him.

But the English Court has a discretion to order a different disposition if the transfer to the foreign curator would be prejudicial to the lunatic's interests.

Didisheim v. *London and Westminster Bank* (1900).
Pelegrin v. *Coutts & Co.* (1915).

If the appointment is made elsewhere than in the lunatic's domicil, the curator is not entitled to the property as of right.

New York Security Co. v. *Keyser* (1901).

If a committee has been appointed in English proceedings, however, his right to all the lunatic's estate in this country is preferred to that of foreign curators.

B.—**Right to custody of the lunatic's person.**

A foreign curator is not recognised to have any right

over the person of a lunatic resident in England unless his appointment is confirmed by the English Court.

The Court may, without appointing the foreign curator committee, arrange for the lunatic to be removed into his custody.

Re Sottomaior (1874).

CHAPTER XIII.

TORTS.

A tort committed abroad is not actionable in England unless—

(a) The act would have been actionable as a tort if committed in England; *and*

(b) It is wrongful (*i.e.*, not justifiable) by the law of the place of commission.

Carr v. *Fracis, Times & Co.* (1902).

An illustration of the sometimes unsatisfactory working of this rule is provided by the case of

The Halley (1868).

This was an action brought against shipowners in respect of a collision caused through the fault of a pilot whom the owners were obliged by the local law to engage. By the *lex loci delicti commissi* the owners were responsible for the negligence of such a pilot: the English action failed because by English law (at that time) owners were not liable for the acts of a compulsory pilot.

A successful plaintiff will be awarded damages for the injury as though the tort had been committed in England. It is immaterial that the remedy to which he would have been entitled in the country of commission is different.

Machado v. *Fontes* (1897).

In the above case, although in the place where the tort was committed the defendant's only liability was to a criminal prosecution, this was held not to affect the plaintiff's right to recover damages in this country.

There is some doubt as to what is meant by "not justifiable" in the second part of the rule.

It has been held that a subsequent legalisation of the injury in the place of commission will make the act "justifiable".

Phillips v. *Eyre* (1870).

In two Canadian Workmen's Compensation cases it was decided that no action would lie in tort where, by the law of the place of commission, the plaintiff had no right of action against the employer: a statutory board being responsible for the determination of the amount of compensation to be paid, and for the enforcement of the payment.

Walpole v. *Canadian Northern Railway* (1923).
McMillan v. *Canadian Northern Railway* (1923).

Torts against foreign land.

It is well established that no action will lie in England where the whole subject-matter consists of a foreign immovable.

British South Africa Co. v. *Companhia de Moçambique* (1892, 1893).

Torts committed on the High Seas.

1. **Acts done on board the ship.**—The law of the ship's flag is the *lex loci delicti commissi*: the ordinary rule as to actionability in England of foreign torts applies, exactly as if the act had been committed in the country to which the ship belongs.

2. **Collisions.**—All actions brought in England in respect of collisions on the high seas between ships, irrespective of their nationality, are governed by the maritime law, which is part of the Common Law of England.

Chartered Mercantile Bank of India v. *Netherlands Steam Navigation Co.* (1883).

The English rules as to assessment of damages and limitation of liability are codified in the Merchant Shipping Acts, 1894—1907, and the Maritime Conventions Act, 1911.

The exclusive applicability of English maritime law probably extends to all "external acts", *i.e.*, alleged wrongs committed by the ship to the property of others.

Submarine Telegraph Co. v. *Dickson* (1864).

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